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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Frank Foster, Phillip Wamock, individually, on behalf of all others similarly situated, and on behalf of the general public,

Plaintiffs,

vs.

Nationwide Mutual Insurance Company,

Defendant.

Case No.: C3:07-CV-4928 SI

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a).

Date: December 7, 2007
Time: 9:00 a.m.
Court: 10

Date originally filed: October 16, 2007

Before the Honorable Susan Illston

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STATEMENT OF THE ISSUES

Has Defendant met its burden of proving that the facts warrant a transfer of venue from the Northern District of California to the Southern District of Ohio?

ANSWER: No.

INTRODUCTION

Defendant's motion for a change of venue to the Southern District of Ohio presumes a case that does not currently exist. It presumes the court has already granted FLSA conditional certification and judicial notice. It presumes every eligible plaintiff nationwide has opted-in to the action. And it presumes Plaintiffs have succeeded in obtaining a third year of damages and are even entitled to a fourth year of damages – despite the fact that only the California Plaintiffs are eligible for such benefit. Indeed, Defendant wants this Court to believe this case is already configured in a way that Defendant will later vigorously attempt to prevent. It is this fictional case that Defendant erroneously uses as the backdrop in support of its motion. Such reliance is fatal to its motion.

Defendant's attempts to draw parallels between Evancho v. Sanofi-Aventis U.S., Inc., 2007 WL 1302985 (N.D. Cal. May 3, 2007) and this case do not save its argument. On the contrary, the important distinctions between this case and Evancho should persuade this Court not to rule as it did there, and deny Defendant's motion here. For example, California has the largest number of Special Investigators employed by Defendant in the last four years (36), and Plaintiffs' Rule 23 class action claims under California law makes the California Special Investigators not only the largest state putative class in the country, but currently the only putative class. Conversely, there are currently no Ohio plaintiffs in the case, nor is there an Ohio state law class action claim creating an Ohio putative class. Defendant's plea for litigation in the backyard of its corporate headquarters is further suspect, since one of its subsidiaries, Allied Insurance, maintains regional headquarters in northern California and employed one of the Plaintiffs – and presumably many other potential Plaintiffs.

Defendant's motion should be denied for a host of additional reasons. First, Plaintiffs' choice of venue should be given considerable deference because Plaintiff Foster resides in this District, he worked for Defendant in this District, and represents a California class whose claims are based on California law. Second, it is more convenient for the parties and witnesses to litigate this case in California than in Ohio because the important critical facts in this misclassification overtime case – job duties and hours worked – will likely be decided with testimony and

documents provided by the Special Investigators, their co-workers, and their direct managers – all of whom live and work across the country, not in Ohio. Because California has the only putative class, and the largest number of potential class members, it is reasonable to conclude that more witnesses and Plaintiffs will be in California than anywhere else in the country. Third, this District is more familiar with California law than the Southern District of Ohio. Finally, as noted in Evancho, California has an interest in protecting the rights of the putative California class members. For these, and all the reasons that follow, Defendant's motion should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

Two individual Plaintiffs, one residing in the Northern District of California, the other in Arkansas, brought this California class action and nationwide collective action for unpaid overtime compensation, failure to provide wage statements, waiting time penalties, and meal and rest break compensation, pursuant to the Fair Labor Standards Act ("FLSA"), the California Labor Code, and the California Unfair Competition Act. See Dkt. 1. The named Plaintiffs are or were employed as Special Investigators for Defendant, and alleged they were improperly classified as "exempt" employees and unlawfully denied overtime and other compensation as a result. Id. at ¶¶ 5-6.

Defendant Nationwide Mutual Insurance Company is a national property and casualty company. See Wieneck Decl., ¶ 3. It maintains offices throughout the country, including California. See Dkt. 13 at ¶ 7. Its affiliate, Allied Insurance, maintains regional offices in Sacramento, Camarillo and Law Mesa, California. See Exhibit A. Plaintiff Wamock worked for Defendant as a Special Investigator through this affiliate for at least part of his employment. See Wamock Aff. at ¶ 2.

Unlike Rule 23 class actions – like the one Plaintiffs brought here under California state law – similarly situated plaintiffs must "opt-in" to FLSA collective actions, and the statute of limitations continues to run until they file a "consent to join" form with the Court. See 29 U.S.C. § 256. For this reason, Courts routinely "conditionally certify" FLSA classes, and approve the distribution of judicial notice of the case to potential plaintiffs explaining their right to join by filing a consent form. Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 169-70 (1989);

Leuthold v. Destination America, Inc., 224 F.R.D. 462, 467 (N.D. Cal. 2004) (citations omitted).

Defendant brings this motion to change venue before Plaintiffs' motion for FLSA conditional certification and judicial notice pursuant to 29 U.S.C. § 216(b) and Hoffman-LaRoche. Therefore, the other Special Investigators employed by Defendant have not received notice of this lawsuit, and have joined only as the result of Plaintiffs' informal efforts and word of mouth. To date, there are 16 Plaintiffs who have filed consents to join this lawsuit in this manner – 4 in California, 1 in Arizona, 1 in Arkansas, 1 in Georgia, 2 in Missouri, 1 in Mississippi, 1 in Nevada, and 5 in Texas.[1] Morgan Aff., ¶ 2. According to Defendant's data, there have been 36 Special Investigators over the past four years who worked in California, making California the state with the largest number of Special Investigators employed during this period. See Dkt. 15, p. 3; Wieneck Decl., ¶ 4. No Special Investigators from Ohio have filed a consent to join form in this case, and Plaintiffs have not moved to amend to add any claims under Ohio, or any other, state laws.

LEGAL ARGUMENT

I. DEFENDANT'S BURDEN AND THE STANDARD FOR CHANGE OF VENUE.

To justify a transfer of venue pursuant to 28 U.S.C. § 1404(a) the moving party must establish: (1) that venue is proper in the transferor district; (2) that the action could have been brought in the transferee district; and (3) that the transfer will serve the convenience of the parties and witnesses and promote the interests of justice. Evancho, 2007 WL 1302985, *1 (citing Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp., 820 F. Supp. 503, 506 (C.D. Cal. 1992)). The factors to determine the third element of this analysis include: (1) plaintiffs' choice of forum; (2) convenience of the parties; (3) convenience of the witnesses; (4) ease of access to the evidence; (5) familiarity of each forum with the applicable law; (6) feasibility of consolidation with other claims; (7) any local interest in the controversy; and (8) the relative court congestion and trial time in each forum. Evancho, 2007 WL 1302985, *1 (citing Williams v. Bowman, 157 F.Supp.2d 1103, 1006 (N.D. Cal. 2001)).

[1] On Friday, November 16, 2007, Plaintiffs' counsel received an additional consent to join form making the total number 17. Such consent form has not yet been filed with the Court.

The burden is on Defendant to show that when applying these factors, the balance of convenience "clearly favors transfer." Strigliabotti v. Franklin Resources, Inc., 2004 WL 2254556, *3 (N.D. Cal. Oct. 5, 2004 (citing Futures Trading Comm'n v. Savage, 611 F.2d 270, 279 (9th Cir. 1979)); see also Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986) ("The defendant must make a strong showing of inconvenience to warrant upsetting the plaintiffs' choice of the forum.") (citations omitted). It is inappropriate to transfer a case pursuant to 28 U.S.C. § 1404(a) where the transfer merely shifts the convenience from one party to the other. Decker Coal Co., 805 F.2d at 843; see also Salinas v. O'Reilly Automotive, Inc., 358 F. Supp. 2d 569, 572 (N.D. Tex. 2005) (denying Defendant's motion to transfer venue of a collective action under the FLSA to the District in which Defendant's headquarters was located) (citing Enserch Int'l Exploration, Inc. v. Attock Oil Co., Ltd., 656 F. Supp. 1162, 1167 n. 15 (N.D. Tex. 1987)).

II. THE COURT SHOULD DENY DEFENDANT'S MOTION BECAUSE DEFENDANT IS UNABLE TO MEET ITS BURDEN UNDER THIS STANDARD.

A. Considerable Weight Should be Afforded to Plaintiffs' Choice of Venue

Courts in the Ninth Circuit afford considerable weight to a plaintiff's choice of venue. Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986). While in class actions a plaintiff's choice of venue is generally given less weight, if there is a significant connection between the forum and activities alleged in the Complaint, weight to plaintiff's choice of venue should still be accorded. Strigliabotti, 2004 WL 2254556, *3 (citing Wade v. Indus. Finding Corp., 1992 WL 207926, *3 (N.D. Cal. May 28, 1992)); Investor Protector Corp. v. Vigman, 764 F.2d 1309 (9th Cir. 1985).

Plaintiffs' choice of venue should be afforded considerable weight for two reasons. First, Plaintiff Foster is a resident of this District. As a misclassification case, the crux of this case will be Plaintiffs' job duties and hours worked. For all 36 California Class members, most of the evidence regarding these critical issues will come from the Special Investigators themselves, their co-workers and immediate supervisors – all of whom were eyewitnesses to these critical facts. The largest group of Plaintiffs in this case – currently 4 opt-in Plaintiffs and 32 putative Rule 23

class members - presumably live and work in California.

Second, the operative facts have occurred in the Northern District of California. As a result, this Court has an interest in the parties and the subject matter, and considerable weight should be given to Plaintiffs' choice of venue. Evancho, 2007 WL 1302985, *2; see also Salinas, 358 F. Supp. 2d at 571 (noting that the opt-in structure of collective actions strongly suggests that Congress intended to give plaintiffs considerable control over where to bring an FLSA action, and concluding that Plaintiff's choice of venue was entitled to respect).

Defendant argues that little or no weight should be afforded Plaintiffs' choice of venue because one of the named Plaintiffs resides in Arkansas. See Dkt. 15 at p. 8. It relies on cases where plaintiffs commenced actions in Districts in which they did not reside. Such arguments and cases are wholly inapplicable to this case because there is no question that Plaintiff Foster lives and works for Defendant in the Northern District of California. The notion that Plaintiffs are "forum shopping" lacks all credibility when the first Plaintiff to commence the action does so in the same district in which he lives, where he works and where he has been cheated compensation by his employer. See Morgan Aff. at ¶ 3.

B. The Northern District of California Is as or More Convenient for the Parties and Witnesses than the Southern District of Ohio

Defendant relies on Williams v. Bowman, 157 F. Supp. 2d 1103 (N.D. Cal. 2001) for the proposition that the convenience of the parties and witnesses is a factor that is entitled to "great weight." Dkt. 15 at p. 9. This reliance is misleading as no such statement is made in Williams. Nonetheless, it is the Defendant's burden to show the Southern District of Ohio is more convenient for the parties and witnesses than this District. Defendant has failed meet its burden.

1. Convenience of Defendant.

Defendant argues that its "witnesses" (all of whom are employees) are mostly located in Columbus, Ohio, and therefore it is more convenient for this case to be litigated in Ohio. Defendant ignores the distinction made in this District and around the country that the primary consideration on convenience rests not on employee witnesses (like those on which Defendant relies) but on third party witnesses. Flotsam of California, Inc. v. Huntington Beach Conference

and Visitors Bureau, 2007 WL 1152682, *3 (N.D. Cal. April 18, 2007) (citing Gundle Lining Constr. Corp. v. Fireman's Fund Ins. Co., 844 F. Supp. 1163, 1166 (S.D. Texas 1994) ("It is the convenience of non-party witnesses, rather than that of employee witnesses, [ ] that is the more important factor and is accorded greater weight.")); Strigliabotti, 2004 WL 2254556 at *5 (citations omitted). Importantly, Defendant fails to identify any third party witness to this litigation – let alone third-party witnesses for whom this District would be inconvenient. Instead, Defendant merely identifies corporate employees who generally live and work in Columbus, Ohio and would have to travel to California in the rare instance a trial occurs. See Effron v. Sun Line Cruises, Inc., 67 F.3d 7, 10 (2nd Cir.1995) (holding "forum is not necessarily inconvenient because of its distance from pertinent parties or places if it is readily accessible in a few hours of air travel").

Similar to Defendant, in Olympia Steel Buildings Systems Corp. v. General Steel Domestic Sales LLC, the defendants argued that transfer from the Western District of Pennsylvania to the District of Colorado was appropriate, in part, because two of the corporate defendants resided in Colorado and their employees were all located in Colorado. Olympia Steel Buildings Systems Corp., 2007 WL 1816281, *7 (W.D. Pa. June 22, 2007). The Court rejected this argument and persuasively reasoned:

> "[T]he convenience of witness[es] that are employees of a party carries no weight because the parties are obligated to procure their attendance at trial"…As to the expense associated with transporting these employees to Pennsylvania for trial testimony, General Steel and Anthem have not argued such testimony could not be effectively presented via videotaped trial depositions…To the extent that General Steel and Anthem speak of third party witnesses, they have not identified who these individuals are, how their testimony is relevant, and whether these individuals would in fact be willing to testify.

Id. at *7.

For the same reasons the Olympia Steel Building Systems Corp. court deemed defendants' arguments on convenience unpersuasive, this Court should as well. Defendant has failed to identify any third party witness. See also Moore v. Motor Coach Industries, Inc., 487 F. Supp. 2d 1003, 1008 (N.D. Ill. 2007) (neither party identified a single material third-party witness located in Illinois and therefore the court found the convenience of witnesses factor as neutral).

Defendant also completely ignores the option of presenting employee testimony by videotaped trial deposition. See Fed. R. Civ. P. 32(a).

Defendant greatly exaggerates the number of corporate witnesses in Ohio that will be necessary in this case. While its headquarters is in Columbus, Ohio, Defendant is a nationwide insurance company having employees and offices in nearly every state including California. It is true that a handful of corporate employees will have to testify in a Rule 30(b)(6) deposition in connection with its nationwide policies and practices, but far more witnesses will come from the eye witnesses to the critical facts in this case, and these witnesses are located across the country. Because the California class constitutes the largest concentration of Special Investigators, on balance, there are likely far more important party witnesses in California than in Ohio.[2]

2. Convenience of Plaintiffs

Defendant argues that the Southern District of Ohio is more convenient for Plaintiffs because there are more putative class members who reside in the "Eastern half of the country" than in California. Defendant's argument is based on erroneous legal assumptions and fuzzy math. First, notwithstanding the fact that Defendant failed to define the phrase "Eastern half of the country" (leaving Plaintiffs and this Court to speculate which states comprise this category), Defendant's argument ignores the current reality of the case. Currently, of the 16 opt-in Plaintiffs, 11 are from "Western" states (4 California, 1 Arizona, 1 Nevada, and 5 Texas) and 5 from "Eastern" states (1 Arkansas, 1 Georgia, 2 Missouri, 1 Mississippi). Morgan Aff., ¶ 2. In addition, California is the only putative class, with 32 remaining members of that class.

Second, Defendant's statistics are based on a list of Special Investigators who worked for Defendant during the last four years, even though the applicable statute for their claims is two years. Only the California Plaintiffs have a four year statute of limitations. See Cal. Bus. Prof. Code § 17208. The FLSA, which is currently the only claim the "Eastern" plaintiffs have, is a two year statute, with a third year for willfulness. 29 U.S.C. § 255(a). Therefore, because

[2] Even if this Court were inclined to determine that transfer is more convenient for Defendant, such a finding cannot alone justify transfer as courts should not transfer cases merely to switch the inconvenience from Defendant to Plaintiffs. See Ellis v. Costco Wholesale Corp., 372 F. Supp. 2d 530, 541 (N.D. Cal. 2005).

Defendant is obviously not conceding willfulness, Defendant's totals for Ohio and elsewhere except California should be reduced by one-third to one-half – rendering Defendant's claim of 24 potential Ohio plaintiffs to 15 to 18, while the current California Plaintiff number remains 36.

Third, Defendant ignores the fact that because the Court has not granted judicial notice, it is impossible to determine how many Plaintiffs will participate in the action, and therefore, how many critical witnesses live in "Western" or "Eastern" states. Because Defendant is certainly going to contest conditional certification and notice, it should not have the benefit for purposes of this motion a result it will contest in the future.

Finally, Defendant ignores the reality of nationwide collective actions. Most often the putative class members' depositions are taken in their home districts. Some may testify at trial, but many do not. Thus, transfer to Ohio serves no real practical purpose for putative class members in the "Eastern half of the country" even if the Court accepted Defendant's calculations as accurate.

C. The Southern District of Ohio does not Provide Easier Access to Evidence

Many of the important facts will come from Special Investigators and their direct supervisors who, as Defendant has acknowledged, are scattered across the country. The corporate documents that will be used as evidence in this case are presumably stored in electronic format. Defendant argues that such documents (policies and payroll information) are located in Columbus, Ohio – making the Southern District of Ohio a superior forum. But Defendant must do more than generally allege that certain relevant documents are located in Columbus. Because of modern technology and the ease of moving documents, Defendant must show that moving the records would cause hardship. DeFazio v. Hollister Employee Share Ownership Trust, 406 F. Supp. 2d 1085, 1090-91 (E.D. Cal. 2005) (citations omitted). Defendant has made no such showing and cannot do so because the information that Defendant has represented as pertinent to this lawsuit is typically stored in electronic format making production quite simple.

D. The Northern District of California is More Familiar with California Law

There are California state law claims at issue in this case including overtime, meal and rest breaks claims, failure to provide wage statements and waiting time claims. This factor alone

favors the Northern District of California as the appropriate forum. Evancho, 2007 WL 1302985 at *4. Contrary to Defendant's representations, the California state law claims are unique to California and are not mirror images of the FLSA. Indeed, counsel for Defendant vigorously highlighted the substantial differences between the FLSA and the "novel and complex" California state law claims by unsuccessfully challenging a recent motion to amend California state law claims in a different special investigator case in the Southern District of New York. Lynch v. United Services Automobile Ass'n, 1:07-cv-562-CM-KNF (S.D.N.Y.), Dkt. 79, pp. 7-10, attached to Morgan Aff. as Exhibit B ("The California claims implicate eight different California statutes and/or wage orders, and present novel and complex issues of state law").

E. The Northern District is Less Congested than the Southern District of Ohio

Defendant argues that transfer could ease the burden on this Court and "may" result in a speedier resolution in Ohio. In so doing, Defendant relies on the number of cases each District had pending in 2006. This Court has noted, however, that the better measure of court congestion is time from filing to disposition. Strigliabotti, 2004 WL 2254556 at *6.

The very statistics on which Defendant relies actually shows that the Northern District of California is less congested than the Southern District of Ohio: in 2006 the median time from filing to disposition in this District was 7.4 months compared with 12.6 months in the Southern District of Ohio. See Exhibit C.

F. The Northern District Has a Greater Local Interest in this Controversy

"California has an interest in protecting the rights of the putative California class members." Evancho, 2007 WL 1302985 at *4. Plaintiff Foster is a resident of this District. Defendant has identified 35 other California Class members who live and work in California. There are currently no Ohio plaintiffs or Ohio specific state law claims. These reasons alone render this District as having a greater local interest than the Southern District of Ohio.

CONCLUSION

In seeking transfer, Defendant wants the benefit of results it will later contest. Its argument presumes Plaintiffs will succeed on conditional certification and judicial notice, adding state law claims, and for summary judgment on third year willful claims. These are results to

which Defendant will undoubtedly not stipulate. Defendant's motion also presumes that 100% of the potential plaintiffs will actually be plaintiffs in this case – a presumption the parties and this Court know to be unrealistic. So until and unless this case progresses to the stage Defendant presumes, Defendant's arguments are fundamentally flawed.

Regardless, Plaintiffs' choice of forum, the national nature of the case, the wide geographic diversity of the witnesses most critical to the claims, the significant size of the California class, and the import and uniqueness of the California state law claims make this Court the best Court to hear this case even under Defendant's presumptive backdrop. For all these reasons, Defendant has undoubtedly failed to meet its burden, and its motion for a change of venue should be denied.

Dated: November 16, 2007

s/ Matthew H. Morgan

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CERTIFICATE OF SERVICE
Foster, et al. v. Nationwide Mutual Insurance Company
Case No. 3:07-cv-04928-SI

I hereby certify that on November 16, 2007, I caused the following document(s):

Plaintiffs' Memorandum Of Law In Opposition To Defendant's Motion To Transfer Venue Pursuant To 28 U.S.C. § 1404(A), Declaration of Matthew H. Morgan in Support of Plaintiffs' Memorandum, Exhibit A, Exhibit B and Exhibit C

to be served via ECF to the following:

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